



**Thanawalla & 2 others v Njoroge (Sued as the Executor of the Will
of John Njoroge Keige (Deceased) & 2 others (Miscellaneous Case
E377 of 2021 & Miscellaneous Application E408 of 2021 (Consolidated))
[2025] KEHC 3632 (KLR) (Commercial and Tax) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CASE E377 OF 2021 & MISCELLANEOUS
APPLICATION E408 OF 2021 (CONSOLIDATED)**

F GIKONYO, J

MARCH 20, 2025

BETWEEN

**TAJDIN THANAWALLA 1ST APPLICANT
JANE MULII KAMENE 2ND APPLICANT
VERONICA KAMENE MUSYIMI 3RD APPLICANT**

AND

**DORCAS NDUGI NJOROGE (SUED AS THE EXECUTOR OF THE WILL OF
JOHN NJOROGE KEIGE (DECEASED)) 1ST RESPONDENT
MICHAEL ROBERT KARANJA 2ND RESPONDENT
SHAZA TWO A LIMITED 3RD RESPONDENT**

RULING

Cross-examination of deponent

1. The question before the court is: whether the 1st judgment debtor should be cross-examined on affidavits sworn on 1st October 2024 and 18th September 2024 in which she deposed that there are no remaining assets of the estate to settle the decretal amount.
2. The issues stem from two applications by the decree holders dated 3rd July 2024 and 17th October 2024. In the former application, the decree holders, sought, among others, an inventory of the assets of the



deceased and an order for the attachment and sale of the assets of the deceased listed sufficient to settle the decretal amount as at 30th May 2024.

3. The backdrop is that the parties had agreed to purchase two shares from the 3rd applicant for the investment of 10 similar fully furnished apartments in the Shaza for Kshs. 6,625,000/-. The dispute had ensued when the respondents refused to transfer the apartment to the appellants or refund the deposited amounts. Through an arbitral award by Prof. Paul Musili Wambua published on 19th April 2021, the applicants' claim was successful. The respondents applied to set aside the award, but the court found no merit in the application and allowed the application for recognition and adoption of the award as a decree through a ruling of 21st March 2024.
4. Following the filing of the application of 3rd July 2024, on 18th July 2024, Justice Mabeja gave the following orders, issued on 5th August 2024:-
 1. A temporary injunction be granted restraining the 1st and 2nd Judgment Debtors whether by themselves or their agents or servants or otherwise howsoever from selling, transferring or in any manner dealing with any shares in any listed company in the Nairobi Stock Exchange and the Central Depository and Settlement Corporation do within three (3) days upon service of this order, freeze any and all of the accounts in the names of the following judgment debtors:
 - c. The CDSC account number 5460 in the name of the late John Njoroge Keige National Identity Card Number 7570224.
 - d. The CDSC account of Michael Robert Karanja.and do furnish the Plaintiffs' Advocates and the Court with a complete record of all the shares owned by the judgment debtors and details of the transfer or sale of shares between July 2020 and March 2024 pending the determination of this application.
 2. The 1st Judgment Debtor and executrix of the estate of the late John Njoroge Keige be restrained from intermeddling or transferring the monies in bank accounts and any other movable and immoveable assets of the estate of the deceased not exceeding the sum of Kshs. 19,000,000 sufficient to settle the decretal amount as at 30th May 2024.
 3. The 1st Judgment Debtor and executrix of the estate of the late John Njoroge Keige be ordered within 7 days of the Order of the court to produce under oath the full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith between 7th July 2020 and 21st March 2024 in respect of the estate of the late John Njoroge Keige in respect of: -
 - c. The full inventory of all his bank accounts in credit, shareholdings at the Nairobi Stock Exchange, all other assets and liabilities at the date of his death together with an estimate of the value of his movable and immovable assets and his liabilities set out in his Local Will dated 15th April 2016 sufficient to settle the decretal amount arising from the arbitral award adopted as a decree of the court.
 - d. The full and accurate account of the completed administration filed in the succession court.
 4. That the same to be complied within 30 days of the date of service.
 5. That the same be personally served upon the Judgment debtor.
 6. That in the meantime Wilson to file and serve a withdrawal application within 14 days.



7. That mention 7/10/2024.
5. The 1st respondent then filed the affidavit sworn on 18th September 2024 containing an inventory of the deceased's assets and dealings with the estate.
6. The applicants then filed the second application of 17th October 2024. Prayers 3 and 4 of the application, which are relevant to the issue under consideration, are reproduced below:-
 3. The 1st Judgment Debtor be summoned to court to be cross-examined on the contents of the Affidavit to be filed pursuant to this order and her Replying Affidavit dated 1st October 2024 and Affidavit dated 18th September 2024 setting out the Inventory of the Estate of John Njoroge Keigi (deceased).
 4. The court do send for the record Milimani High Court (Family Division) P & A No. E1120 of 2020 in the matter of the estate of John Njoroge Keige (Deceased) for inspection to verify the assets and liabilities of the estate.
7. When the matter came up before Justice Mabeya on 20th November 2024, he directed that the prayer for cross-examination should be addressed first due to the allegation of perjury. He also directed that the parties highlight their submissions on prayers 3 and 4 of the application dated 17th October 2024 on 13th February 2025.
8. The matter came up before this court on 13th February 2025 and Mr. Otieno for Mr. Allen for the applicants and Mr. Omiti for the 1st respondent opted to rely on their written submissions. Mr. Omiti clarified that the 1st respondent's submissions were in respect of prayers 3 and 4 of the application dated 17th October 2024 not prayer 5 of the application of 3rd July 2024 and prayer 3 in the application of 17th October 2024, as indicated.

Power to order cross-examination

9. The court has discretionary power to order attendance of a deponent for cross examination under Order 19 Rule 2 of the [Civil Procedure Rules](#) which provides:-
 - “ 2.
 - (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
 - (2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”
10. The court's discretion must be exercised based on principle and reason, not capriciously or on a whim. [G-G-R v H-PS](#) [2012] KEHC 5208 (KLR)
11. The rule of thumb is that the applicant must lay the basis for cross-examination of a deponent of an affidavit; and that, such application should be allowed in special circumstances. *Lawson and Anor v Odhams Press Ltd. and Anor* (1948) 2 All ER 717
12. The court should consider whether the cross examination would aid the course of justice and whether the respondent would be prejudiced. [Khen Kharis Mburu & another v James Karong Ng'ang'a & another](#) [2021] KEHC 8721 (KLR)



13. The applicants' gravamen is based on the 1st respondent's deposition that there are no remaining assets of the estate to settle the decretal amount.
14. The applicants asserted that the 1st respondent should be cross-examined on her affidavits of 18th September 2024 and 1st October 2024 wherein she deposed that there are no remaining assets of the estate to settle the decretal amount. They also asserted that the 1st respondent committed perjury by swearing a false affidavit when she swore her replying affidavit. They cited *Khen Kharis Mburu & another v James Karong Ng'ang'a & another* [Supra], Republic v Kenya Revenue Authority exparte, Althaus Management & Consultancy Ltd and *Lawson and Anor v Odhams Press Ltd. and Anor* (1948) 2 All ER 717, *G G R v H-PS* [supra], *Baby v Sekar*, Petition M. P No. 1 of 2014 (2 December 2014).
15. The applicants submitted that the deceased's assets were unlawfully transferred contrary to section 38 of the *Civil Procedure Act*. They faulted the 1st respondent for omitting the arbitral award published on 19th April 2021 as a liability or disclosing it when she filed the application for confirmation of grant dated 7th October 2021, more than 6 months after the publication of the Award.
16. The applicants asserted that the 1st respondent has committed perjury, fabricated evidence to mislead the court by transferring assets of the deceased to defeat the satisfaction of the decree, and obstructed the lawful execution of the decree under sections 113, 114 and 117 of the *Penal Code*.
17. The applicants relied on *In re Estate of Barrack Deya Okul (Deceased)* [2018] KEHC 8599 (KLR) to argue that a debt owed by the estate should be included as a liability once a petitioner is notified of its existence and that a decree is a proven liability that must be included in the list of liabilities. They also relied on *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR, to assert that Section 83 of the *Law of Succession Act* imposes a duty on administrators to settle debts the deceased left unsettled before distributing the estate.

Response

18. The 1st respondent opposed the application through grounds of opposition dated 24th October 2024, a replying affidavit sworn on 16th December 2024 and Dorcas Ndugi Njoroge and written submissions dated 12th February 2025.
19. The core contentions are that the application is premature, bad in law, incompetent, pre-emptive and is otherwise an abuse of the court process and should be dismissed in limine; that the issues raised should have been addressed through a further affidavit to the replying affidavit sworn on 1st October 2024; that the application is calculated to cause unnecessary delay and confusion in the prosecution of the application dated 3rd July 2024; that the 1st respondent stands to be prejudiced by the unnecessary litigation costs and delay. The 1st respondent urged the court to dismiss the application and direct the applicant to file a further affidavit, if need be, in response to the replying affidavit.
20. The 1st respondent asserted that through the two applications, the decree holders seek to have the deceased's estate to satisfy the entire judgment debt yet the judgment was also entered against the 2nd and 3rd respondents. She also asserted that even if the debt was owing at the time of confirmation of the grant of probate, which is not the case, the same was not meant to be fully settled by the estate.
21. The 1st respondent also asserted that she has complied with the orders of 5th August 2023 by filing an inventory dated 18th September 2024. That she also filed a replying affidavit sworn on 1st October 2024 in response to the first application. That the deceased died testate and appointed her as executrix through his last will and testament dated 15th April 2016. That she has performed her duties as executrix



- within the powers conferred under the will and within the framework of certificate of confirmation of grant and the *Law of Succession Act*.
22. The 1st respondent denied that she unlawfully transferred the deceased's assets contrary to section 38 of the *Civil Procedure Act*, asserting that the distribution was done correctly. She added that all the transfer of property within the estate was lawful before the determination of any liability of the estate.
 23. She also highlighted that even though the arbitral award was published on 19th April 2021, the award was subject to appeal. The court's ruling on the appeal was delivered on 21st March 2024 yet the grant was issued on 23rd November 2021.
 24. She thus denied that she deliberately concealed the deceased's assets. She argued that the arbitral award had not accrued as a debt during the pendency of the appeal challenging the award and before it was formally adopted as an order of the court capable of being executed.
 25. The 1st respondent relied on *Scope Telematics International Sales Limited v Stoic Company Limited* NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR for the assertion that the applicants failed to comply with the proper form through filing a motion instead of a chamber summons. However, this is an oversight that can be overlooked according to Article 159(2)(d) of the *Constitution*.
 26. The 1st respondent argued that the applicant have not given sufficient reasons for the court to exercise its discretion to summon her for cross-examination. This is because the applicants have raised mere suspicion that she has not said the truth in the inventory. She relied on *GGR v HPS* [2012] eKLR and *Republic v Kenya Revenue Authority, Ex Parte Althaus Management and Consulting Ltd* [2015] eKLR.
 27. I have considered the counterarguments. I have also read the two affidavits sworn by the 1st respondent. The alleged contradictions in the affidavits of 18th September 2024 and 1st October 2024 were not established or manifest.

The frame

28. However, the depositions by the 1st respondent raise two critical issues of law; a) whether the 1st, 2nd and 3rd respondents are jointly and severally liable to satisfy the award herein; and how any liability herein against the estate the late John Njoroge Keige should be settled; and b) whether the 1st respondent ought to have listed the award as a liability of the estate in the application for confirmation of grant before it was adopted as a decree of this court.
29. Arguments by the applicant that: Section 83 of the *Law of Succession Act* imposes a duty on administrators to settle debts the deceased before distributing the estate, fall within these issues. As well as, that the deceased's assets were unlawfully transferred contrary to section 38 of the *Civil Procedure Act*; fall within the issues identified above.
30. Similarly, arguments by the 1st respondent that, she has performed her duties as executrix within the powers conferred under the will and within the framework of certificate of confirmation of grant and the *Law of Succession Act*; are the other side of the coin; and also fall squarely within the two issues formulated above.
31. Ultimately, the request for the attachment and sale of the assets of the deceased listed sufficient to settle the decretal amount as at 30th May 2024 shall be determined within the framework cut out in the issues above.



32. The issues identified should be addressed by the parties through filing of further affidavits and submissions as well as by citing relevant law. The alleged fraudulent transfer of estate property saddle upon the above two issues; their determination will lay the functional foundation for the determination of the propriety of those transfers. Cross-examination of the deponents is not terribly required to ascertain these issues; it will only become a source of further delay in these proceedings.
33. The 1st respondent urged the court to direct the applicant to file a further affidavit, if need be, in response to the replying affidavit.
34. This is a reasonable proposal. The areas of concern raised by the applicant which require deposition in an affidavit, should be so laid before the court. Appropriate orders and directions will be given on this as well as the filing of submissions at inter partes plenary.
35. Therefore, I am not persuaded that, given the material before the court, the applicants have laid sufficient basis for the cross-examination of the 1st respondent.
36. I do not need to evaluate prayer 4. In their submissions, the applicants acceded that prayer 4 is spent as they obtained the pleadings from the succession file and exhibited them in the supplementary affidavit sworn on 11th November 2024. But, the pleadings are relevant in these proceedings in determining whether there has been any concealment of assets of the deceased; and the full inventory of those assets.
37. In the upshot, the court only determines and rejects the request for cross-examination of the respondent.
38. The application dated 17th October 2024 fails to the extent it seeks cross-examination of the 1st defendant. No order as to costs.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 20TH DAY OF MARCH, 2025.

F. GIKONYO M
JUDGE

In the presence of: -

Kithinji for Allen for Decree Holder

Ms Mumbi for Wamiti for 1st Judgment Debtor

CA - Kinyua

